Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

24 August 2018

SEC-OGC Opinion No: 18-16
Re: Applicability of Anti-Dummy Law on Partly-Nationalized Activities

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Attention: **ATTY. FRANCISCO E. RODRIGO, JR.**
ATTY. MANUEL C. FAUSTO, JR.
ATTY. BRYAN ORVILLE R. CIPRES

Attorneys:

This refers to your letter dated 11 May 2016, requesting the Commission's opinion, on behalf of your client, Cenertec Philippines, Inc., ("Cenertec") on whether or not it is engaged in a partly-nationalized activity, and the applicability of the Anti-Dummy Law[1] thereof.

As stated in your letter, Cenertec is engaged in the business of power generation, trading, supply, distribution and/or transmission. Its current equity structure is sixty percent (60%) owned by Filipinos and forty percent (40%) owned by foreigners. Its incumbent president is a French national. Your letter further states that you were advised by the Company Registration and Monitoring Department of the Commission that Cenertec is a corporation engaged in a partly-nationalized activity because its paid-up capital is less than the peso equivalent of US$200,000. Thus, you were further informed of a possible violation of the Anti-Dummy Law for electing a foreigner to a management position.

Hence, your query.

Section 2-A of the Anti-Dummy Law, which applies to corporations engaged in wholly or partially nationalized activity or business undertaking prohibits the employment of any

[1] Commonwealth Act No. 108, as amended.

person, corporation, or association of an alien, who shall intervene in the management, operation, administration or control thereof, whether as officer, employee, laborer, when the exercise or enjoyment of the property or of the franchise privilege, or business engaged in by such person, corporation or association "is expressly reserved by the Constitution or the law to the citizens of the Philippines" or "corporations or associations at least 60% of the capital of which is owned by such citizens"; however, it allows such alien to be elected as director in proportion to his allowable participation or share in the corporation's capital.

To determine if Cenertec is covered by the Anti-Dummy Law, specifically by Section 2-A thereof, it is important to determine first if the corporation is engage in a partly nationalized activity or business undertaking.[2]

On whether or not Cenertec is engaged in a partly-nationalized activity

Cenertec's amended Articles of Incorporation states its primary purpose, to wit:

> "To engage in the business of **power generation, power trading, power supply, power distribution and/or power transmission** in accordance with Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 (the EPIRA and its implementing rules and regulations), and for this purpose: (a) to establish, build, construct, acquire, develop, operate, maintain and administer power plants, transmission and distribution lines, power stations and sub stations and other works; (b) to transmit, generate, supply, sell, whether in bulk or retail such power to industrial users, distributors and other public utilities, electric cooperatives and industrial consumers; (c) **to operate as a public utility in distributing, selling and supplying to the general public such power and electricity for their consumption**; and (d) to enter into contracts and other transactions or agreements relating to power, by itself, or through its subsidiaries and affiliates." [emphasis ours]

Section 11 of the 1987 Constitution provides that: "*No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least 60% of whose capital is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years.* xxx"

Public utility is defined as one organized for hire or compensation to serve the public which is given the right to demand its service should they like to do so. It is a business or

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[2] An undertaking or activity is partly nationalized, within the meaning of Section 2-A of the Anti-Dummy Law, if its enjoyment or exercise is limited by the Constitution or any law to corporations or associations at least 60% of the capital of which is owned by Filipino citizens, that is to say, the minimum equity participation required to be owned by Filipinos is 60%. (Department of Justice Primer on Anti-Dummy Law)

service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone or telegraph service.[3]

Applying the foregoing to Cenertec, while electric power generation is not considered a public utility operation under the Electric Power Industry Reform Act of 2001, transmission and distribution of electric power to the general public are[4]. Item C of Cenertec's primary purpose provides; "(c) **to operate as a public utility in distributing, selling and supplying to the general public such power and electricity for their consumption**". For this reason, Cenertec is engaged in a public utility operation, a partly-nationalized activity, subject to 40% foreign equity restriction under the 1987 Constitution and the Tenth Foreign Investment Negative List (FINL-10)[5].

Furthermore, considering that Cenertec's paid-up capital is less than the peso equivalent of US$200,000, it may be classified as a domestic market enterprise[6] which is subject to 40% foreign equity restriction under Section 8 of the FIA and List B of the FINL-10, which provide:

> "Section 8. xxx xxx xxx
>
> Small and medium-sized domestic market enterprises with paid-in equity capital less than the equivalent of two hundred thousand US dollars (US$200,000) are reserve to Philippine nationals: Provided, that if (they involve advanced technology as determine by the Department of Science and Technology, or (2) they employ at least fifty (50) direct employees, then a minimum paid-in capital of one hundred thousand US dollars (US$100,000) shall be allowed to non-Philippine nationals."
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> "List B---
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> Foreign ownership is limited up to 40% foreign equity for protection of small and medium scale enterprises:
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> Domestic market enterprises with paid-in equity capital of less than equivalent of US$200,000.

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[3] Albano vs. Reyes GR No. 83551, 11 July 1989

[4] **Electric Power Industry Reform Act of 2001, Section 6**. xxx Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise. xxx
Section 7. Transmission Sector. - The transmission of electric power shall be a regulated common electricity carrier business, subject to the ratemaking powers of the ERC. xxx
Section 22. Distribution Sector. - The distribution of electricity to end-users shall be a regulated common carrier business requiring a national franchise. xxx

[5] List A: Foreign ownership is limited by mandate of the Constitution and specific laws, xxx
Up to Forty Percent (40%) Foreign Equity, xxx
19. Operation of public utilities

[6] Domestic market enterprise shall mean an enterprise which produces goods for sale, or renders services to the domestic market entirely (Section 1(k) of the FIA IRR).

> Domestic market enterprise which involve advance technology or employ at least fifty (50) direct employees with paid-in equity capital of less than the equivalent of US$100,000.

Based on the foregoing, Cenertec is engaged in an undertaking classified as a partly nationalized activity under the aforementioned laws. Consequently, the Anti-Dummy Law applies.

Applicability of the Anti-Dummy Law to Cenertec

The Commission has held in previous opinions that foreigners can be elected as directors in proportion to their participation or share in the capital of corporations engaged in activities that are reserved to Filipinos, but are prohibited from being elected as officers of a corporation, such as the President, Vice President, Treasurer and Secretary.[7]

This is consistent with the previous rulings of the Department of Justice, stating that in firms engaged in wholly or partially nationalized activities, aliens are banned from being appointed as officers of the corporation, such as the president, vice-president, treasurer, auditor, etc. of said companies, although they can be elected directors in proportion to their allowable participation or share in the capital of such activities in accordance with the Anti-Dummy law.[8]

Consequently, the application of the Anti-Dummy Law on Cenertec bars Mr. David Philippe Perrin-Wenger, a French national, from acting as its President.

It shall be understood that the foregoing opinion is rendered based solely on the facts disclosed in the query and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the courts, or upon the Commission in other cases of similar or dissimilar circumstances. If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.[9]

Please be guided accordingly.

CAMILO S. CORREA
General Counsel

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[7] SEC-OGC Opinion No. 14-05 addressed to Atty. Rester John L. Nonato dated 25 April 2014.
[8] Ibid.
[9] SEC Memorandum Circular No.15, Series of 2003.